

Before the
**LIBRARY OF CONGRESS
COPYRIGHT OFFICE**
Washington, D.C. 20540

**GENERAL COUNSEL
OF COPYRIGHT**

JAN 8 1997

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In re: Determination of Statutory)	
License Terms and Rates for Certain)	No. 96-5
Digital Subscription Transmissions)	CARP DSTRA
of Sound Recordings)	

**DCR AND MUZAK'S JOINT OPPOSITION TO RIAA'S MOTION TO COMPEL
SERVICES TO PRODUCE IMMEDIATELY ALL DOCUMENTS UPON WHICH THEIR
WITNESSES RELIED AND TO PRECLUDE DIRECT TESTIMONY REGARDING
REQUESTED DOCUMENTS NOT PRODUCED**

Digital Cable Radio Associates ("DCR") and Muzak, L.P. (collectively the Music Services), through their attorneys, hereby oppose the RIAA's above-captioned motion to compel.

In this motion, the RIAA asserts that the Music Services have somehow failed to comply with their obligations under the discovery rules of this arbitration. Curiously, the RIAA does not allege that the Music Services have actually violated their discovery obligations in any way. Indeed, the RIAA cannot cite as inadequate a single response to its numerous requests for documents. Rather, the RIAA's motion focuses only on general statements made by the Music Services in which they properly reserve certain inherent rights in this arbitration.

Despite their innocent nature, the Music Service's statements seem to have made the RIAA uncomfortable. For no reason other than to raise its own comfort level, the RIAA now asks the Copyright Office to order the Music Services to re-affirm that they have complied with the discovery process. The Music Services have complied with the discovery requests by submitting responsive pleadings signed by counsel that either pose proper objections to the requests or that provide responses identifying documents relied upon by the witnesses and producing such documents. Requests for

additional affirmations would be little more than belt and suspender measures. (See 37 C.F.R. section 251.44(e) ("The signature of an attorney constitutes certification that to the best of his or her knowledge and belief there is good ground to support the document.")). The RIAA has done no more. No additional affirmations are now required.

If the RIAA believes particular responses are inadequate, it should raise those responses directly. In reality, the RIAA cannot cite specific responses, because it recognizes that the Music Services have produced all non-privileged documents responsive to the requests that were actually reviewed and relied upon by a witness. Simply put, the RIAA is not entitled to more.

On a more substantive level, the RIAA's request for an order limiting their ability to exercise certain rights in the future, based on unknown circumstances and events, is premature. In that sense, it should be denied without prejudice to the RIAA's right to raise the motion in the future should events warrant it.

Most of the statements to which the RIAA takes offense are nothing more than a reservation of the right by the Music Services to seek relief from the Copyright Office or the CARP in the future to permit additional discovery or to introduce documentary evidence; others are simply re-statements of the limits of the scope of discovery in this proceeding. For example, the RIAA has objected to DCR's reservation of the right to produce additional documents "should the need arise." It would be premature for the Copyright Office to rule today that no circumstance can give rise to such a need in the future. There is no reason why this issue must be addressed now, and cannot be postponed until an actual controversy is at hand. Indeed, the regulations controlling the admissibility of evidence in this proceeding suggest that the CARP itself retains broad authority to admit evidence. (See 37 C.F.R. section 251.48 ("evidence that is not unduly repetitious or cumulative and is relevant and material shall be admissible."))

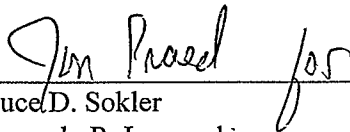
Setting aside the fact this motion is premature, the motion should be denied simply because the RIAA itself has failed to live by the rules it seeks to impose on the Music Services. In its motion, the RIAA asks the Music Services to "state affirmatively that they have produced all ... documents." However, nowhere in the RIAA's responses does it make this affirmative statement. In addition, the RIAA has failed to clearly state whether or not responsive documents exist for at least fifty requests for documents. In response to these requests, the RIAA has said only that its witness relied on his or her "knowledge of the music industry." (See, e.g., Berman Responses #1, 2, 3, 4 and 5; Rosen Responses #1, 2, 3, 4, 5, 6, 7 and 8; Horowitz Responses #1, 2, 3, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17 and 20; Wilkofsky Responses #7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21 and 22, that are contained in the RIAA's December 12, 1996 Response to Joint Request for Documents; and Responses #1, 2, 3, 4, 5, 7, 8, 9 and 10, that are contained in the RIAA's December 12, 1996 Response to Muzak's Request for Documents.) None of these fifty responses contains an affirmative statement that either responsive documents will be produced or that no responsive documents exist. Contrast these RIAA responses with the few that do contain such a statement. See Horowitz Response #8 ("Responsive documents will be produced.") and Gerbrandt Response #2 ("There are no documents that are responsive to this request."), that are contained in the RIAA's December 12, 1996 Responses to Joint Request for Documents. The RIAA's unclean hands taint its entire motion.

This is not the only standard the RIAA seeks to apply to the Music Services, despite its own failure to comply. As an additional example, the RIAA asks in its motion for the Copyright Office to "preclude the Services from presenting direct testimony regarding or relying upon documents that RIAA has requested but are not immediately produced." This request is in stark contrast to the position the RIAA took in response to a document request posed by one of the Music Services. When the RIAA was asked to produce all documents it intended to present to the CARP, it objected to the request, and refused to produce any documents. (See Response #12, contained in the RIAA's December 12, 1996

Responses to Muzak's Request for Documents.) If the discovery rules require complete disclosure, both sides should be ordered to comply.

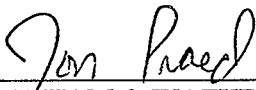
For all the above reasons, the Music Services respectfully request the Copyright Office to deny the RIAA's motion.

Respectfully submitted,


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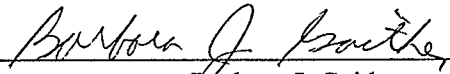
Certificate of Service

I hereby certify that on January 8, 1997, a copy of the foregoing pleading entitled "DCR and Muzak's Joint Opposition To RIAA's Motion To Compel Services To Produce Immediately All Documents Upon Which Their Witnesses Relied And To Preclude Direct Testimony Regarding Requested Documents Not Produced" was served by fax upon the following:

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